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IN THE

Supreme Court of the United States

Term

No. 708

AETNA INSURANCE COMPANY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner Aetna Insurance Company, a corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 18, 1965, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, rehearing having been denied August 2, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (26a) is not reported.[1] The opinion of the Court of Appeals (1) is reported at 346 F. 2d 985.

These opinions are printed as appendices to this petition at pages 24 and 28.

[1] Record references such as 26a are to the Appellant's Appendix in the Court of Appeals, a copy of which has been filed with this Court. Record references consisting of numerals only are to the record certified to this Court by the Court of Appeals.

JURISDICTION

Judgment of the Circuit Court of Appeals was entered on June 18, 1965 (1). Rehearing was denied on August 2, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

The relevant statutes are:

1. Internal Revenue Code of 1939, §§874, 900.

2. Internal Revenue Code of 1954, §§7402, 7404.

3. Judicial Code §24 (1), 28 USC §§1331-2, 1341-2, 1345, 1354, 1359.

4. Revised Statutes, §3467, 48 Stat. 760, 31 USC §192.

QUESTIONS PRESENTED

1. Whether this Court should let stand a judgment of the Court of Appeals which, although not disagreeing with petitioner's contention that the only cause of action pleaded by the Government was barred by the statute of limitations, nevertheless affirms the adverse judgment of the District Court on the basis of a different cause of action that was never pleaded, never tried, and never considered by the District Court, never briefed or argued in the Court of Appeals, and which appeared for the first time in the opinion of the Court of Appeals.

2. Whether this Court should let stand a judgment of the Court of Appeals based on such a completely new alleged cause of action which, if it had been pleaded in the District Court, would have been dismissed for lack of jurisdiction over probate matters.

3. Whether this Court should let stand a judgment of the Court of Appeals which allows any alleged creditor or beneficiary of a trust to bring suit to hold fiduciaries personally liable in the District Court rather than in the state courts, which have exclusive original jurisdiction in probate matters.

4. Whether, assuming that a "new trust" enforceable against the administrators could be created by the Court of Appeals, that Court erred in failing to apply the limitation period set out in §§874, 900 of the Internal Revenue Code of 1939, and in holding the surety (petitioner) liable without any proof that its bond would cover such a situation.

STATEMENT OF THE CASE

This case involves a judgment by the Court of Appeals for the Third Circuit, affirming the judgment of the U. S. District Court for the Eastern District of Pennsylvania, in favor of the United States, against administrators of the estate of Morris D. Rose, deceased, individual defendants, and against petitioner, their surety.

By its action, the United States sought to establish personal liability of the individual defendants for federal estate taxes and to recover from petitioner Aetna Insurance Company, the surety, the amount of the said taxes.[2]

On June 18, 1947, defendants Rose and Wittenberg executed an administrator's bond in Pennsylvania together with surety Century Indemnity Co. (succeeded by defendant Aetna), in the usual form covering the acts of Rose and Wittenberg, Administrators of the Estate of Morris D.

[2] At pages 2 and 3 of the opinion, the Court of Appeals said that "the defendant surety admits that if the individual defendants are liable, it is liable." Petitioner's counsel knows of no basis for that statement, which is quite contrary to the views expressed in the surety's brief to the Court of Appeals and its oral argument before that Court.

Rose, in the sum of $140,492.00. The bond was reduced to $20,000.00 as of August 1, 1948, by the Orphans' Court of Philadelphia County.

On December 23, 1952, per stipulation of counsel, a Tax Court Decision found that the Estate of Morris D. Rose owed an estate tax deficiency of $7,377.86.

On February 12, 1953, pursuant to the Tax Court decision, the Commissioner of Internal Revenue made an assessment against the estate in the amount of $9,789.91, representing the deficiency of $7,337.86 and $2,451.65 interest. Thereafter, the estate paid $2,000.00 of the assessment.

Just one day short of six years after the assessment, namely, on February 11, 1959, the United States filed Civil Action No. 25933 under the Internal Revenue laws of the United States against Rose and Wittenberg, as Administrators of the Estate of Morris D. Rose, Deceased, and was granted a default judgment for the amount of the estate tax deficiency plus interest. The United States did not sue the Administrators personally in that action and never took any action seeking to assert any personal liability until the complaint was filed in this action on April 26, 1963, over ten years after the Tax Court decision and the Commissioner's assessment against the estate.

The Government's action was expressly based (3a) on Section 3467 of the revised statutes, 31 USC §192, which provides as follows:

> "Every executor, administrator, or assignee, or other person, who pays in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

The basis for jurisdiction alleged in the complaint (3a) was Sections 7402 and 7404 of the Internal Revenue Code of 1954. No other basis of jurisdiction was stated or suggested, either in the complaint, or in the proof, or at any time thereafter. No basis of liability was asserted in the complaint other than the section of the revised statutes mentioned above.

The Answer of the defendant Rose raised (16a), *inter alia*, as an affirmative defense, the statute of limitations, the statute in question being the Internal Revenue Code of 1939, §§900 and 874. (The statutory provisions appear in the appendix to this petition at pages 21 to 23).

Both sides filed motions for summary judgment, the motion by the Government being unaccompanied by any affidavits or factual material except the evidence of estate tax liability. The affidavit of defendant Rose averred (18a-21a) that the taxes were assessed against the estate on February 12, 1953; that both individual defendants had been in the United States continuously since prior to that date; and that more than six years had expired prior to the institution of this action against the administrators to establish their personal liability.

On April 17, 1963, the District Court, in an opinion by Judge Kirkpatrick, granted summary judgment to the United States against all defendants, on a theory which ignored the difference between the prior judgment against the administrators, in their representative capacity, and the present suit against them personally (26a-29a).

On appeal from the orders granting the above summary judgment, the matter was briefed and argued exclusively on the basis of the liability alleged in the complaint, to wit, Section 3467 of the revised statutes, and the issues presented with respect to (1) the statute of limitations, and (2) the liability of the surety, apart from the liability of the administrators.

The decision of the District Court was affirmed by the Court of Appeals for the Third Circuit, not on the theory put forward by the District Court, or indeed on the cause

of action pleaded and argued by the Government, but on an entirely new cause of action not theretofore pleaded, proved, considered, briefed or argued.

The Court of Appeals held that, wholly apart from the question of liability under Revised Statutes Section 3467, the facts were sufficient to establish a trust in favor of the Government, which the Court of Appeals assumed could be enforced in the District Court.

The Court also held, without citation of any relevant authority, that such a "trust fund" judgment would come within the terms of petitioner Aetna's bond, a conclusion without foundation in the record and never argued or briefed in the Court of Appeals.

With respect to the principal issue, the statute of limitations, the opinion of the Court of Appeals did not disagree with the position taken by petitioner, saying (6):

"Several of the authorities cited by the district court appear to support its view that R.S. §3467 provides the United States with a separate and independent form of relief in estate tax cases and that suits brought under that statute are confined by the general six-year statute of limitations governing proceedings in court for collection. If, as has been argued, that period of limitation begins to run against the Government at the time of the original assessment against the estate, the instant suit would be barred."

But the Court added (7):

> "We find no need, however, to deal with the problems presented by this argument, for we think that under the particular circumstances of this case arising from the 'petition to reduce bond,' the 'consent of the surety' and order of the Orphans' Court, the individual liability of the administrators to the Government is wholly independent of the liability established under R.S. §3467."

The Court then proceeded (7-8) to hold that the legal consequences of the statement in the administrators' peti-

tion to reduce bond, filed in the Orphans' Court in December 1949, that their compliance with that Court's order to make distribution had left "in their custody only funds or property required to pay any outstanding obligation which may be found to be due as federal estate tax to the United States", a matter "now pending", were: "(1) an expressed declaration of trust for the benefit of the United States Government; (2) a distribution of those particular funds of the estate by them as administrators to themselves as trustees for the United States."

The Court of Appeals then said (8) that:

> "Under these circumstances the United States is not here attempting to establish vicarious liability under §3467, i.e., for disbursing the funds to others before paying the estate tax to the United States. The Government, on the contrary, here is attempting to collect from its trustees the funds which they hold in trust for it. As a matter of law, the Government could petition the Orphans' Court of Philadelphia County to compel the trustees to account, see In re Harbison's Estate, 365 Pa. 468, 76 A. 2d 187 (1950), or attach their persons until they do so. 20 Purdon's Pa. Stat. Ann. §§2080.751, .752. On the other hand, the United States surely is free to bring this action in the United States District Court, Hickey v. Illinois Central R.R., 278 F. 2d 529, 532 (C.A. 7), cert. denied, 278 U.S. 529 (1960), to require the trustees to account. There can be no question that the suit, as so understood, is timely."

As the result of the rejection of the cause of action that had been litigated in both courts, and the injection of this new "trust" cause of action by the Court of Appeals, petitioner filed a timely petition for rehearing, which was denied by that Court on August 2, 1965.

REASONS FOR GRANTING THE WRIT

SUMMARY

1. By ignoring the only cause of action pleaded, tried and argued in the trial court and the Court of Appeals, and affirming the District Court's judgment on the basis of an alleged cause of action never pleaded, proved, argued or suggested by the Government, and which appears for the first time in its opinion, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require correction by this Court.

2. The result of the Court of Appeals' action is to permit the Government to prevail on the basis of a cause of action which, if it had been pleaded in the District Court, would have been dismissed because it is not within the jurisdiction of the federal courts.

3. The effect of the Court of Appeals' decision is to permit suits by creditors or beneficiaries, as well as the Government, to establish and enforce the personal liability of fiduciaries in the federal courts, which do not have jurisdiction of such actions.

4. The effect of the Court of Appeals' decision is to hold a surety liable on its bond on an alleged cause of action which was never pleaded against the surety, without any proof that such a claim is within the coverage of the surety's undertaking, and without giving the surety any opportunity to be heard on the issue of its liability.

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1. The Court of Appeals first indicated that it agreed that the applicable statute of limitations barred the only cause of action pleaded by the Government, and briefed and argued in the District Court and the Court of Appeals, but then *affirmed the judgment in favor of the Government on a completely new "trust fund" cause of action, which had never been mentioned by the Government in either court*

and which appeared for the first time in the opinion of the Court of Appeals.

By so doing, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision over the federal judiciary. (Rule 19).

The decision here under review also flies in the face of decisions of this Court in similar situations. It is also a patent denial of due process because it denies petitioner any opportunity to be heard on the decisive issue, first raised in the Court of Appeals' opinion.

Moreover, as is set out hereafter, the alleged cause of action injected by the Court of Appeals is one which, even if it had been pleaded by the government, is outside the jurisdiction of the federal courts.

The complaint filed by the Government was quite clear concerning the basis of the claim that the administrators were personally liable. Paragraph 1 averred (3a) that "this is a civil action to recover judgment against the defendants Morton Rose and Betsy R. Wittenberg, administrators of the estate of Morris D. Rose, establishing their personal liability for estate taxes pursuant to revised statutes 3467 (31 USC 192) and to recover from the defendant, Aetna Insurance Company, the amount of said estate taxes pursuant to its obligation as surety on said administrator's bond."

Revised statute Section 3467 is a special and particular remedy, which in its present or predecessor form dates back for many years. As it now stands, the statute is construed to impose a species of liability without fault. Therefore, in investigating the case and framing its defense, the surety was guided accordingly, because there could be little doubt that the administrators had come within the terms of Section 3467 as judicially construed.

On this state of the pleadings and on cross motions for summary judgment, the case was briefed and argued in the District Court, which decided (26a-29a) in favor of the

Government, on the ground that the applicable statute of limitations was that which governed the effect of a Pennsylvania judgment. This basis of decision was clearly erroneous, since it ignored the distinction between the judgment against the administrators in their representative capacity, which was not involved in this case, and a suit to recover against them as individuals under Section 3467.

On the appeal of this decision to the Circuit Court, the opinion of the Circuit Court agreed (6) that the lower court had misconceived the issue in its reference to the Pennsylvania statute of limitations applicable to a judgment; it also agreed, impliedly at least (7), that the cause of action under Section 3467 was barred by the statute of limitations contained in the Internal Revenue Code. But that court went on to find that a new "trust" had been created on the occasion of the petition to reduce bond, from which the court deduced new responsibilities of the administrators, and said this resulted in a revision of the contractual undertaking of the surety, petitioner herein. The latter crucial conclusion was cryptically stated in a single short paragraph at the end of the court's opinion (10).

Petitioner respectfully submits that the decision of a case on a theory which had not been previously pleaded, proved, briefed, argued or considered at any stage of the litigation, without an opportunity to either party to be heard concerning same, is contrary to the principles on which our entire system of jurisprudence is based. The orderly process of decision contemplates that the decisive legal and factual issues will be framed by the pleadings, supported by proof and then argued to judges who will decide those issues in accordance with established law.

The rules of the Court of Appeals and this Court emphasize the necessity of framing legal issues in connection with the briefing and argument of an appeal. The Court of Appeals Rule 24 (2) (b) requires, as part of the brief of appellant, a statement of the questions involved. This is deemed so important that the rule states expressly:

> "The foregoing requirements are to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

Of similar import is this Court's Rule 23 (1) (c), stating in pertinent part:

> "Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

It is true, as stated on page 7 of the opinion of the Circuit Court, that, in a proper case, the judgment of the District Court may be affirmed if it is correct, though based on incorrect reason. However, where the *cause of action alleged* in the pleadings *is barred by the statute of limitations*, as the Circuit Court apparently agreed, and affirmance of the judgment is based on another cause of action which was not suggested or even implied in the pleadings, which was never considered in the court below, and which never occurred to government counsel, it is clear that petitioner has been denied its day in court and denied an opportunity to be heard on the issue which the court decided against it.

Such a denial deprives the petitioner of the procedural safeguards essential to due process of law. This Court has so indicated on many occasions. See, for example, *Cole v. Arkansas*, 333 U.S. 196 (1948); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Esnault-Pelterue*, 299 U.S. 201 (1936); *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Lincoln Gas & E. L. Co. v. Lincoln*, 223 U.S. 349 (1912); *Londoner v. Denver*, 210 U.S. 373 (1908).

Surely a United States citizen has a right to receive from the federal government at least as great a measure of due process of law as this Court requires the state to accord

to any defendant in a criminal case. In *Cole v. Arkansas*, 333 U.S. 196, 202 (1948), this Court said:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law."

In cases such as this, the proper procedure is that which was followed by the same Court of Appeals in *Rothenberg v. Rothstein & Son*, 181 F. 2d 345 (3rd Cir. 1950), where the Court of Appeals ordered a rehearing *sua sponte* because the point the court thought decisive had not been raised below and the parties had not addressed themselves to it.[3] The Circuit Court stated at page 347:

> "We think it desirable, in the interest of fairness and as an aid to the Court, that the litigants have the opportunity to review them [decisive points], and to submit their views in briefs and oral arguments."

Any other procedure violates standards laid down by this Court. See, for example, *Gibson v. United States*, 329

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[3] See the general rule stated in 5 Am. Jur. 2d, Appeal and Error, §974, p. 403:

> "If issues involving rights of the parties were not presented or decided in the lower court they will not be decided on appeal but the cause will be remanded for further proceedings. A cause may be remanded for the purpose of enabling the parties to introduce evidence on an issue that the lower court did not consider necessary to decide, or which was not passed upon by the jury, or as to which the court erroneously excluded evidence. A new trial will be directed where a reversal is ordered on grounds not called to the attention of the trial court, and for defects which the opposing party was given no opportunity to remedy."

U.S. 338 (1946); *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364 (1939); and see *World Fire and Marine Insurance Co. v. Carolina Mills Distributing Co.*, 169 F. 2d 826 (8th Cir. 1948).

2. In its opinion, the Court of Appeals stated (8):

> "On the other hand, the United States surely is free to bring this action in the United States District Court . . . to require the trustees to account."; citing in support thereof *Hickey v. Illinois Central R.R.*, 278 F. 2d 529, 532 (7th Cir. 1960), cert. den. 278 U.S. 529 (1960).

The *Hickey* case, however, was not an action brought by the United States, nor did it deal with probate matters. It was a suit by individuals against a railroad for unlawful use of air space. The question of jurisdiction over the subject matter was not raised in *Hickey* since there was no federal jurisdiction over the persons involved (diversity). The dictum in *Hickey* is not germane to the present case, since the problem in this case is federal jurisdiction over *the subject matter* rather than the parties.

In this case, the cause of action injected by the opinion of the Court of Appeals is, in effect, a suit to surcharge the administrators and, therefore, not within the jurisdiction of the federal district court. It has long been established that those courts do not have jurisdiction of cases dealing with the administration of the estate of a decedent, except to the extent that such jurisdiction is vested in the local courts of general jurisdiction (as distinct from the probate court). *Sutton v. English*, 246 U.S. 199 (1918). In Pennsylvania "the surcharge of fiduciaries is within the exclusive jurisdiction of the Orphans' Court," *Horner v. First Penna. Banking and Tr. Co.*, 412 Pa. 72 (1963), and not in the courts of general jurisdiction. This has been the law of Pennsylvania for more than one hundred years. See *Kittera's Estate*, 17 Pa. 416 (1851).

In *Sutton*, jurisdiction was claimed on diversity of citizenship and jurisdictional amount, but, since the suit under Texas law was cognizable only by the probate court, it was held to be not within the jurisdiction of the federal district court.

Although it is true that the Judicial Code, 28 USC §1345 gives jurisdiction to the district court of actions commenced by the United States, the complaint by the United States by which this action was commenced averred, in paragraph 2, *not* that section of the Judicial Code, but Sections 7402 and 7404 of the Internal Revenue Code of 1954. In any event, no matter what basis is alleged for jurisdiction dependent on identity of the parties, this case stands on no better ground than if jurisdiction were founded on diversity (as in *Sutton*), since the problem of jurisdiction over the subject matter remains.

In *Allen v. Markham*, 147 F. 2d 136 (9th Cir. 1945), it was held that Section 24 (1) of the Judicial Code (now 28 USC §§1331-2, et seq.) "does not give jurisdiction over matters of probate which are not cases or controversies within the meaning of Article 3 of the Constitution"; and this, nothwithstanding the fact that the suit was by the Alien Property Custodian as an officer of the United States. On appeal, the Supreme Court affirmed the principle that "a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and Section 24 (1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters." *Markham v. Allen*, 326 U.S. 490, 494 (1946). It held, however, that suit could be maintained in that case because it came within the category of a suit by creditors or heirs against the estate to *establish their claims;* but expressly limited jurisdiction to those cases in which the "federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S. at 494.

Any suit which seeks to *charge the trustee with personal liability* on the ground of mismanagement is precisely within this prohibited category. *Princess Lida v. Thompson*, 305 U.S. 456 (1939). Nor can there be any question that a claim of surcharge in connection with the account of an administrator involves a purely probate function outside the jurisdiction of the federal district court. *Louisville Trust Company v. Smith*, 192 F. Supp. 396, 402 (W.D. Ky., 1961), appeal dismissed 295 F. 2d 107 (6th Cir. 1961), modified 330 F. 2d 483 (6th Cir. 1964).

The distinction is well illustrated by *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947), in which it was stated that, where diversity of citizenship and jurisdictional amount are present, suit may be brought in the district court against the administrator to establish the validity of a *claim against the estate;* but, after termination of that litigation, the federal court must then certify to the state court its determination as to validity and amount.

This Court has always been vigilant in its efforts to enforce the requirements for federal jurisdiction, even to the extent of raising jurisdictional questions on its own motion when they have been overlooked by counsel.

In *Mansfield, Cold Water and Lake Michigan Rwy. v. Swan*, 111 U.S. 379 (1884), this Court stated:

> "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception which requires this Court, on its own Motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear on the record on which, in the exercise of that power, it is called to act. On every Writ or Appeal the first and fundamental question is that of jurisdiction, first, of this Court, and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not suggested, and with-

out respect to the relation of the parties to it." 111 U.S. at 382.

This principle has been embodied in Rule 12 (a), Federal Rules of Civil Procedure, 28 USC, and applies even though the pleadings are sufficient but the record does not support the allegations. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Morris v. Gilmer*, 129 U.S. 315 (1889).

Surely no reason exists for disregarding this rule where the jurisdictional question concerns the subject matter rather than the parties to the action.

3. The effect of the decision by the Court of Appeals to exercise jurisdiction over this probate matter is the creation of a conflict in principle between that Court and this Court (as evidenced by the cases cited above) which, if not resolved, will result in the serious impairment of the orderly administration of decedent's estates not only in Pennsylvania but in all jurisdictions.

In addition, it is significant that there is nothing peculiar or unique in the present situation which would confine the precedent in the Court of Appeals' opinion to cases in which the United States is the creditor. On the contrary, the reasoning is equally applicable to every case in which, after an accounting is filed, funds remain in the hands of the administrator for disposition pending the outcome of some dispute. This precedent is thus potentially applicable to the administration of every decedent's estate and its impact will be felt throughout every state in the land.

Armed with this decision of the Court of Appeals, any alleged creditor with a disputed claim against an estate may with equal justice assert that a new and special "trust" was created for his benefit after the administrator had filed an account and petition to reduce bond—situations quite commonplace in Pennsylvania and in other states. Having succeeded in establishing such new "trust", he may then proceed to enforce it, in any court of general

jurisdiction, including the federal courts, on precisely the theory for which the Court of Appeals has supplied the precedent. For, although it does not purport to deal with cases in which ordinary creditors or beneficiaries are involved, the opinion does not suggest or afford any ground for any distinction between cases involving the Government as a "beneficiary" of the trust and any other "beneficiaries". It is impossible to see how any such distinction may be drawn which would be consistent with the reasoning adopted by the Court of Appeals.

Thus, any fiduciary may be held personally liable to any "beneficiary" in a court of general jurisdiction (including the federal courts where diversity and jurisdictional amount is shown) on the ground that he has made distribution to the wrong parties, without the necessity of going before the probate court by which the administrator was appointed, to which he is responsible, and which has traditionally exercised exclusive original jurisdiction over the administration of decedents' estates.

The cause of action adopted by the Court of Appeals in its opinion is one designed to enforce the alleged personal liability of a fiduciary for his acts in administering the trust estate. According to the settled law of Pennsylvania, this may be done only in the Orphans' Court: *Horner v. First Penna. Banking & Tr. Co.*, 412 Pa. 72 (1963); *Real Estate Savings and Tr. Co. v. Lewis*, 340 Pa. 86 (1940).

4. Another more immediate and practical consequence of this decision is the impact it will have on all sureties on administrators' bonds. From the surety's standpoint, the present case teaches that the surety should never consent to any reduction of any bond. According to the opinion of the Court of Appeals, such actions on its part will expand its undertaking to the point that it will henceforth be required to answer without regard to the condition of its bond, in courts other than the Orphans' Court for charges against fiduciaries of misapplication of assets, and without regard to the fact that the statute of limitations has run. Any such

expansion is highly prejudicial to the surety whose original undertaking was conditioned on a proper accounting only to the appropriate orphans' or probate court.

This case represents a good example of the result. Although the surety has not been informed concerning the precise manner in which the assets were distributed, it is reasonable to suppose that they were distributed among some or all of the heirs of the deceased. As the opinion of the Court of Appeals in this case recognized, the Government as beneficiary could petition the Orphans' Court to compel the trustees to account or attach their persons until they do so (8). But if the assets were distributed to parties who received them with full knowledge that they were participating in an alleged breach of trust, the remedies in the Orphans' Court whereby the surety might recoup some or all of its loss, both against the administrators and distributees, would be very different from those available in the district courts or the courts of common pleas, and certainly those remedies would be more effective than a money judgment on the indemnity claim in this proceeding against the administrators alone.

In its opinion, the Court of Appeals accorded great weight to the "consent" to the reduction of bond; and said that:

> "It is clear that the surety company with full knowledge of the petition consented to a revision of the terms of its obligations as set forth in the 'Petition to Reduce Bond'." (10)

The only "revision" to which the surety consented was the reduction in amount of the bond. This was not a consent to any revision or, in effect, an *elimination of the conditions* on its bond. As has already been suggested, if this is the law, no surety will henceforth consent to any reduction in any bond, since it receives no consideration whatever for such consent; indeed, it is agreeing to a *reduction* of the annual premium and is making a sacrifice to help reduce

the cost of administration by eliminating a needless expense. If such consent is to be construed a "revision", and a drastic revision at that, no surety would ever consent to accept a reduced premium for higher risks, and the consequential increase in expense will fall on a great many estates, since this situation arises frequently.

Granted that revised statute, Section 3467 was enacted to afford the Government a different remedy than that provided in the probate court; but, if, as the Court of Appeals indicated, that statutory remedy is no longer available because the statute of limitations has expired, there is *no legal basis* on which the surety may be haled before another court and deprived of the conditions of this bond and what, for it, must be understood as significant rights and remedies.

Clearly, the questions presented involve issues of state versus federal power and are therefore important in the administration of decedents' estates in every state of the Union. Settlement of these questions by this Court is plainly in the public interest since they are likely to be presented in a great many decedents' estates and involve not only tax claims of the Federal Government but also claims of each and every creditor against a decedent's estate.

CONCLUSION

The judgment of the Court of Appeals in favor of the Government cannot stand because that Court first indicated that the statute of limitations barred the only cause of action actually pleaded by the Government and then affirmed the judgment on the basis of another, different, alleged cause of action which had never been pleaded, proved, argued or briefed in either court.

If the procedure followed by the Court of Appeals in this case is not disapproved by this Court, the Court of Appeals could decide any case for any reason that occurs to it and neither party would need to be given any oppor-

tunity to plead, prove or argue his views on the issue raised by that Court.

In effect, the Court of Appeals could consider every case *de novo*, substitute the appellate judge's own *ex post facto* diagnosis of the case for the case actually pleaded and proved by the parties, and deny the parties any opportunity to be heard on the issues held to be decisive of their rights.

This substitution of judicial hindsight instead of due process of law should not be countenanced by this Court.

Moreover, the cause of action injected into the case by the Court of Appeals is one which, even if it existed, would be beyond the jurisdiction of the federal courts. Such a deviation from the fundamental law governing the relations between the central government and the states should not be permitted to stand.

The judgment of the Court of Appeals should be summarily reversed and that court ordered either to enter judgment in favor of petitioner on the cause of action which the parties presented to the court, or grant a trial on the issues which it injected into the case.

Respectfully submitted,

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APPENDIX "A"

Internal Revenue Code of 1939:

SEC. 874. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as provided in subsection (b) the amount of estate taxes imposed by this subchapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed.

(b) *Exceptions.*—

* * * * *

(2) *Collection after assessment.*—Where the assessment of any tax imposed by the subchapter has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the executor.

(26 U.S.C. 1952 ed., Sec. 874.)

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter.* * *

* * * * *

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31,

§192 in respect of the payment of any such tax from the estate of the decedent.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of Limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the executor.

(2) If a court proceeding against the executor for the collection of the tax has been begun within the period provided in paragraph (1)—then within one year after return of execution in such proceedings.

* * * * *

(26 U.S.C. 1952 ed., Sec. 900.)

Internal Revenue Code of 1954:

SEC. 6502. COLLECTION AFTER ASSESSMENT.

(a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

* * * * *

(26 U.S.C. 1958 ed., Sec. 6502.)

SEC. 6901. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) *Income, estate and gift taxes.*—

* * * * *

(B) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

* * * * *

(c) *Period of Limitations.*—The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

* * * * *

(3) *Fiduciary.*—In the case of the liability of a fiduciary, not later than 1 year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

* * * * *

(26 U.S.C. 1958 ed., Sec. 6901.)

Revised Statutes: Sec. 3467

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(31 U.S.C. 1958 ed., Sec. 192.)

APPENDIX "B"

DISTRICT COURT OPINION SUR CROSS MOTIONS FOR SUMMARY JUDGMENT

Before Kirkpatrick, *J.*

This is a civil action brought under 31 U.S.C. 192 to enforce the personal liability of the defendants, who are administrators of the estate of Morton M. Rose, and their surety, for a federal estate tax assessed against the estate. The section of the law in question provides, in substance, that an administrator who pays any debt owing by his decedent before he pays debts of the decedent due the United States shall be answerable personally to the United States to the extent of such payments.

On February 12, 1953, the Commissioner of Internal Revenue assessed federal estate taxes against the Rose estate, a balance of which tax remains unpaid. The defendant administrators, from 1948 to 1953, distributed all the assets of the estate, disregarding the estate tax liability. The fact that the distribution was made under an order of the Orphans' Court of Philadelphia County is immaterial.

On February 11, 1959, the United States began a suit against the estate to collect the balance of estate tax due on the above assessment and judgment was obtained on July 27, 1959, in the amount of $10,788.47. This judgment remains unpaid.

The present suit was begun April 26, 1963.

The above facts are not disputed and the only question involved in these cross motions for summary judgment is whether any provision of the Revenue Act bars the suit.

It is not questioned by the parties that the distribution made by the defendants was payment of a "debt due by the person or estate for whom" the administrators acted, and it is well settled that an action such as this suit is a proceed-

ing to collect a tax,* in this case to collect the estate tax assessed against the estate in 1953.

The defendants contend that all proceedings to collect an estate tax from the executor or administrator personally are governed by Section 6901(c)(3) I.R.C. which, so far as is relevant to the present controversy, provides that the amount of the liability of administrators under 31 U.S.C. 192 is to be collected in the same manner as the tax in respect of which the liability is incurred and which fixes the time beyond which such tax may not be collected as the expiration of the period for the collection of the tax in respect of which the fiduciary's liability arises. Under this procedure there must have been an assessment of the tax against the administrators as individuals and, also, the suit must have been begun within the period during which the Government could have collected the tax assessed against the estate. This, by the provisions of Section 6502, would be six years from the assessment, or February 12, 1959. The fact that the Government did not begin this suit until ten years after the assessment of the estate tax is the basis for the defendants' argument that the suit is barred by the provisions of 6901.

However, the Government did bring a suit against the estate on February 11, 1959, and got a judgment on July 27, 1959. That suit was timely. Thereafter, the Government could have collected the tax at any time up to July 27, 1964, since the statute of limitations in Pennsylvania for judgments (unless renewed) is five years. The merger of the liability of the estate for the estate tax in the judgment against it, if indeed it could properly be called a merger, did not extinguish the tax liability, and this suit is still a proceeding to collect a tax. "The liability for the amount of the tax remains enforceable and unsatisfied until such time as the judgment is satisfied or barred." United States v.

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* United States v. Weisburn, 48 F. Supp. 393; United States v. Motsinger, 123 F.2d 585, 587. See also United States v. Updike, 281 U. S. 489, 494.

Birns, 223 F.Supp. 94, 96. Thus this suit, brought within that period, would not be barred by the six year limitation even if the procedure prescribed by 6901 was the only available procedure—which, as will appear, it is not.

The defendants also argue that, inasmuch as 6901 incorporates by reference the collection provisions of the Internal Revenue Code, this suit will not lie, for the reason that there has been no assessment against the defendant administrators.

It has been held that Title 31 U.S.C. 192 may be the basis for alternative proceedings to collect the tax, which will not be affected by 6901. "The government is correct, we think, in contending that the remedy provided by I. R. C. § 311 (I.R.C. Sec. 6901) for collection of taxes from transferees and fiduciaries is alternative and not exclusive." United States v. Motsinger, supra, 587.

The limitation that must be applied in this case is the general limitation contained in Section 6502 which provides that where an assessment has been made within the period of limitation properly applicable thereto, the tax may be collected by a proceeding in court, provided the proceeding is begun within six years after the assessment of the tax. In this case the proceeding in court against the estate was begun less than six years after the assessment of the estate tax and admittedly that assessment was timely. Therefore, the six year limitation provided by the statute did not come into effect inasmuch as the judgment of July 27, 1959, extended the time for collection, and the only bar is that which the Pennsylvania law imposes upon judgments, namely, five years from the entry of the judgment.

The defendants' motion for summary judgment is denied.

The plaintiff's motion for summary judgment is granted and judgment may be entered for the plaintiff in the amount claimed.

ORDER

AND NOW, to wit, this 13th day of April, 1964, it is ordered that the opinion in this case, filed February 17, 1964, be amended as follows:

On page 3, line 6, delete beginning with the word "up" to the end of the sentence and insert in lieu thereof "within the life of the judgment."

By THE COURT,

KIRKPATRICK, *J.*

ORDER

Filed: April 16, 1964

The above entitled case having come before this Court on the motions of both the plaintiff and the defendants for summary judgment, and upon the hearing of oral argument and having considered the pleadings, affidavits and exhibits submitted, and upon a finding that there is no genuine issue as to any material fact; and having concluded that the plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendants, Morton M. Rose and Betsy Wittenberg, are personally liable for the tax due and owing from the estate of Morris D. Rose to the plaintiff, United States of America, in the amount of $7,789.51 plus interest at the rate of 6% per annum to this date, together with the costs of this action, and it is further

ORDERED, ADJUDGED AND DECREED that the United States have and recover judgment against the defendant Aetna Insurance Company, surety on the fiduciary bond of said defendants, Morton M. Rose and Betsy Wittenberg, in the amount of $7,789.51 plus interest at 6% per annum to this date, together with the costs of this action.

By THE COURT,

KIRKPATRICK, *J.*

APPENDIX "C"

OPINION OF THE COURT OF APPEALS

(Filed June 18, 1965)

By STALEY, *Circuit Judge.*

This suit for the recovery of money owed for estate taxes has been brought by the United States against Morton M. Rose and Betsy R. Wittenberg, the administrators of the estate of Morris D. Rose, in their individual capacity and against their surety, the Aetna Insurance Company.[1] The defendants do not deny liability for the amount sought to be recovered[2] but rely solely upon the defense of the

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[1] The answer of the Aetna Insurance Company filed in this case contained a crossclaim in indemnity against the company's co-defendants, Rose and Wittenberg. In granting summary judgment to the United States against all defendants on April 17, 1963, the district court failed to dispose of the crossclaim. Appeals were taken from the orders granting summary judgment by Aetna at No. 14988 and by Rose and Wittenberg at No. 15071. The cases were argued on February 12, 1965. Since, of course, the judgment of a district court is not final and, therefore, not appealable until all claims which are part of the same action have been adjudicated, F. R. Civ. P. Rule 54(b), we are required to dismiss those appeals for lack of jurisdiction and do so today in an order filed simultaneously with this opinion.

As the questions involved had, however, been fully briefed and argued and the failure to have judgment entered on the crossclaim was probably a result of inadvertence, we permitted the parties, on their motion to (1) apply to the district court to enter judgment on the crossclaim and (2) to file notices of appeals from the earlier determinations of the district court and the subsequent determination of the counterclaim. Judgment on the counterclaim has now been entered and appeals have now been filed at Nos. 15405 and 15406. The parties have agreed to submit the matter on the briefs filed and the arguments made in the former appeals.

[2] In the district court, the suit was treated as one founded on R.S. §3467, 31 U.S.C. §192, which is as follows:

> "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and

statute of limitations applicable to proceedings in court for the collection of a tax.[3] The defendant surety admits that if the individual defendants are liable, it is liable. The district court rejected the defense.

The relevant facts are not controverted. On April 3, 1946, the individual defendants in this suit were duly qualified as administrators of the estate of Morris D. Rose and

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pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

[3] The taxpayer's statute of limitations defense in the district court, despite some confusing labeling, was clearly based on two distinct sections of the Internal Revenue Code of 1939, §§900 and 874. In pertinent part, those sections provide:

"§900. Transferred assets

"(a) Method of collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

* * * * * *

"(2) Fiduciaries. The liability of a fiduciary under §3467 of the Revised Statutes (U.S.C., Title 31, §192) in respect of the payment of any such tax from the estate of the decedent.

"Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

"(b) Period of limitation. The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the executor.

"(2) If a court proceeding against the executor for the collection of the tax has been begun within the period provided in paragraph (1)—then within one year after return of execution in such proceeding."

"§874. Period of limitation upon assessment and collection

* * * * * *

filed a bond in the sum of $180,492.[4] The final account of the administrators was filed with the Orphans' Court of Philadelphia County, Pennsylvania, on March 31, 1948. In July of the same year, they were ordered to distribute the assets of the estate in accordance with the account. This they did, retaining only sufficient funds to pay the estate tax. In December 1949, the following petition was presented by the administrators to the Orphans' Court of Philadelphia County:[5]

"In the Orphans' Court of Philadelphia County

"Estate of MORRIS D. ROSE, Deceased — No. 1213 of 1948

"Petition to Reduce Bond

"The petition of Morton M. Rose and Betsy Rose Wittenberg, administrators of the estate of Morris D. Rose, deceased, respectfully represents:

"1. On April 3, 1946, your petitioners were duly appointed administrators of the above named estate

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"(b) Exceptions . . .

"(2) Collection after assessment. Where the assessment of any tax imposed by this subchapter has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by a distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the executor."

The district court found that the suit was barred by neither limitation. As will be seen from the opinion, we need not and have not determined this question.

[4] The surety at that time was the Century Indemnity Company, corporate predecessor to Aetna.

[5] Copies of the papers next set out in this opinion were attached to the complaint in the present action. There is no dispute that they were duly filed and here authentically reproduced.

and qualified by filing their bond or bonds in the sum of One Hundred Eighty Thousand, Four Hundred Ninety-two Dollars ($180,492.00).

"2. On March 31, 1948, your petitioners filed their first and final account as administrators of the above estate. An adjudication thereon was entered on July 14, 1948, whereby, inter alia, petitioners were directed to make distribution to the heirs of the decedent.

"3. Your petitioners have complied with this order *leaving in their custody only funds or property required to pay any outstanding obligation which may be found to be due as federal estate tax to the United States.* That matter is now pending.

"4. The maximum federal estate tax that might be assessed will not be in excess of Twenty Thousand Dollars ($20,000.00). The amount of security so heretofore filed is *in excess of any amount required to meet any exigency of their trust.* The continuance of such amount of security requires the payment of a premium to the bonding company that is acting as surety on such bond and creates an unnecessary hardship and expense to the said estate.

"WHEREFORE, your petitioners pray that the secucurity directed to be entered by them be reduced from One Hundred Eighty Thousand, Four Hundred Ninety-two Dollars ($180,492.00) to Twenty Thousand Dollars ($20,000.00).

"And they will ever pray, etc.

"/s/ PETER P. ZION
Attorney for Petitioners

"By Leonard Green"

(Emphasis supplied.)

The surety company in the same proceeding filed the following:

"Consent of Surety

"The undersigned surety hereby consents to the reduction of their bond or bonds for the sum of One Hundred Eighty Thousand, Four Hundred Ninety-Two Dollars ($180,492.00) to Twenty Thousand Dollars ($20,000.00).

"The Century Indemnity Company

"/s/ (Illegible)

"(SEAL)"

Pursuant to the petition and consent, the court entered the following order:

"Order

"AND NOW, to wit, this 7th day of December, A.D., 1949, upon motion of Peter P. Zion, Esq., attorney for the petitioners, and upon consideration of the within petition, containing approval of surety and satisfaction of award signed by all parties in interest,

"IT IS ORDERED AND DECREED that the bond required of the administrators of the above captioned estate be reduced from One Hundred Eighty Thousand, Four Hundred Ninety-Two Dollars ($180,492.00) to Twenty Thousand Dollars ($20,000.00) effective as of August 1, 1948.

"By the Court

"/s/ BOLGER, J."

In 1952, the Tax Court set the tax liability of the estate at $7,337.86. An assessment based on this judgment was made on February 12, 1953.[6] Suit was brought against the

[6] The assessment was in the amount of $7,337.86 for the basic tax and $2,451.65 in interest which had accrued to that date.

estate in 1959 and a default judgment obtained. All execution issued on the basis of that judgment has been returned unsatisfied. The instant suit was commenced on April 26, 1963. In its answer, the surety company cross-claimed against its co-defendants for indemnity.

The district court, acting on cross-motions, granted summary judgment to the United States. Although the grounds for the decision are not entirely clear, it does appear that the action, stated to be one brought under R.S. §3467, was treated as one in the nature of an action on the 1959 judgment against the estate. Having reasoned to that point, the court concluded that the suit was governed by the applicable Pennsylvania statute of limitations on judgments, 12 Purdon's Pa. Stat. Ann. §§ 2092-94. Judged by that standard, the action was clearly timely.

We are doubtful that a proceeding brought under R.S. § 3467 can be treated as one in the nature of an action on a judgment in these circumstances. The 1959 judgment was obtained against the estate; this suit is one against the estate's officers in their individual capacity. Several of the authorities cited by the district court [7] appear to support its view that R.S. § 3467 provides the United States with a separate and independent form of relief in estate tax cases and that suits brought under that statute are confined by the general six-year statute of limitations governing proceedings in court for collection. If, as has been argued, that period of limitation begins to run against the Government at the time of the original assessment against the estate, the instant suit would be barred. We find no need, however, to deal with the problems presented by this argument, for we think that under the particular circumstances of this case arising from the "petition to reduce bond," the "consent of the surety" and order of the Orphans' Court, the individual liability of the adminis-

[7] United States v. Motsinger, 123 F.2d 585 (C.A.4, 1941); United States v. Weisburn, 48 F. Supp. 393 (E.D.Pa., 1943).

trators to the Government is wholly independent of the liability established under R.S. § 3467.

It is settled that the judgment of a district court may be affirmed by a court of appeals where the decision of the district court is correct although based on incorrect reasoning. J. E. Riley Investment Co. v. Commissioner, 311 U.S. 54, 59 (1940); In re Ko-Ed Tavern, Inc., 129 F.2d 806 (C.A.3, 1942); Century Distilling Co. v. Continental Distilling Co., 106 F.2d 486 (C.A.3, 1939), cert. denied, 309 U.S. 662 (1940). Such affirmance may be based on any rationale supported by facts incontrovertibly established in the record. Lum Wan v. Esperdy, 321 F.2d 123, 125-26 (C.A.2, 1963).

The "petition to reduce bond" filed by the administrators, Morton M. Rose and Betsy Rose Wittenberg, in the Orphans' Court sets forth that they had distributed the assets of the estate in accordance with the prior order of the Orphans' Court and that all of the remaining funds were *being held by them to satisfy the estate tax claim of the United States.* They finally declared that *they were holding these funds in trust for this purpose and no other.* Upon this declaration the Orphans' Court acted and expressly approved the petition, in effect permitting them to obtain possession of the funds for this express limited purpose. The legal consequences of these proceedings were: (1) an express declaration of trust for the benefit of the United States Government; (2) a distribution of those particular funds of the estate by them as administrators to themselves as trustees for the United States.

Under these circumstances the United States is not here attempting to establish vicarious liability under § 3467, i.e., for disbursing the funds to others before paying the estate tax to the United States. The Government, on the contrary, here is attempting to collect from its trustees the funds which they hold in trust for it. As a matter of law, the Government could petition the Orphans' Court of Philadelphia County to compel the trustees to account, see In re

Harbison's Estate, 365 Pa. 468, 76 A.2d 187 (1950), or attach their persons until they do so. 20 Purdon's Pa. Stat. Ann. §§ 2080.751, .752. On the other hand, the United States surely is free to bring this action in the United States District Court, Hickey v. Illinois Central R.R., 278 F.2d 529, 532 (C.A.7), cert. denied, 278 U.S. 529 (1960), to require the trustees to account. There can be no question that the suit, as so understood, is timely. The statute of limitations begins to run against the trust beneficiary with respect to a suit against the express trustee, if at all, when he knows the trust has been repudiated or reasonably should have known it. Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Ninth Bank & Trust Co., 306 Pa. 148, 158 Atl. 251 (1932). There is no evidence in this record to suggest that the United States could even have known of the trust arrangement for its benefit until some time after the unsuccessful return of execution on the 1959 judgment. It had no reason to inquire into the location of funds it had the right to believe were still in the estate. Nor can the defense of laches be successfully raised against the United States here, for that defense is only available where "[t]he beneficiary * * * fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable." Restatement (Second), Trusts § 219; In re Meyer's Estate, 173 Pa. Super. 592, 98 A.2d 444 (1953). It is commonly required, for example, that the defendant be substantially prejudiced by the delay. See, e.g., Alker v. Philadelphia National Bank, 372 Pa. 327, 93 A.2d 699 (1953). Neither this nor any other ground for the invocation of laches has been or could be demonstrated in these circumstances. Of course, in any case, neither the statute of limitations nor laches will run against the United States unless a Federal statute particularly permits such. United States v. Summerlin, 310 U.S. 414 (1940); United States v. Doman, 255 F.2d 865, 867 (C.A.3, 1958), aff'd, per curiam, sub nom. Koller v. United States, 359

U.S. 309 (1959); United States v. Silliman, 167 F.2d 607 (C.A.3), cert. denied, 335 U.S. 825 (1948).

It will thus be seen that § 3467 has no application to this case, and consequently whatever statute of limitations is applicable to it cannot be a defense.

The facts in this case can be viewed as requiring the application of an alternative theory of law which equally requires the entry of judgment for the United States.

Those, such as the individual defendants here, who receive funds on the representation that they are holding them for another purport to act as agents for that other and undertake a duty to account with respect to such property. Restatement, Restitution § 124.[8] Such a duty to account arises when a transaction is ratified by the principal. Restatement (Second), Agency § 408. Of course, the filing of the instant suit can be deemed to constitute such ratification on the part of the United States. Restatement (Second), Agency § 97. Since the suit was brought on April 26, 1963, the duty of the administrators to account arose at that time, and there can be no question of the statute of limitations.

As the facts on which these theories rest are set forth in the complaint and the papers attached thereto, and since the only defense raised in the district court is clearly inapplicable, there can be no bar to granting relief to the United States against the administrators in their individual capacity.

The only remaining question is whether the defendant, Aetna Insurance Company, is also liable. At the time the "petition to reduce bond" was under consideration by the Orphans' Court of Philadelphia County, the surety company in connection therewith filed its "consent" to the reduction of the bond. It is clear that the surety company

[8] The general propositions of law supported by Restatement citations in the rest of the opinion find abundant support in the Pennsylvania cases. See generally the appropriate sections of the Pennsylvania Annotations to the Restatement of the Law of Agency and to the Restatement of the Law of Restitution.

with full knowledge of the petition consented to a revision of the terms of its obligation as set forth in the "petition to reduce bond." It is, therefore, bound. Restatement, Security § 128, comment c. See Central Penn Nat. Bank v. Tinkler, 351 Pa. 123, 40 A.2d 389 (1945).

Accordingly, all judgments of the district court will be affirmed.[9]

[9] It was stipulated in the district court that affirmance of the orders granting summary judgment to the United States against all defendants requires affirmance of the judgment on the crossclaim in favor of Aetna against Rose and Wittenberg.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 708

AETNA INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 28–37) is reported at 346 F. 2d 985. The opinion of the district court (Pet. 24–27) is reported at 227 F. Supp. 259.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1965. A petition for rehearing was denied on August 2, 1965. The petition for a writ of certiorari was filed on October 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

794-902—65

QUESTIONS PRESENTED

1. Whether it was permissible for the court of appeals to affirm the judgment of the district court on a different ground from that adopted by the district court.

2. Whether the decision below improperly injects the federal courts into the administration of trusts and estates.

STATUTES INVOLVED

26 U.S.C. 7402(a) provides in pertinent part:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. * * *

26 U.S.C. 7404 provides in pertinent part:

> If the estate tax imposed by chapter 11 is not paid on or before the due date thereof, the Secretary or his delegate shall proceed to collect the tax under the provisions of general law * * *.

STATEMENT

Petitioner, as successor to the Century Indemnity Company, became surety on the bond of Morton M. Rose and Betsy R. Wittenberg, administrators of the estate of Morris D. Rose. The bond (in the amount of $180,492) guaranteed the faithful performance of

the administrators in administering the estate. The administrators petitioned the Orphan's Court of Philadelphia County to reduce the bond, stating in their petition (Pet. 31):

> 2. On March 31, 1948, your petitioners filed their first and final account as administrators of the above estate. An adjudication thereon was entered on July 14, 1948, whereby, inter alia, petitioners were directed to make distribution to the heirs of the decedent.
>
> 3. Your petitioners have complied with this order *leaving in their custody only funds or property required to pay any outstanding obligation which may be found to be due as federal estate tax to the United States.* That matter is now pending.
>
> 4. The maximum federal estate tax that might be assessed will not be in excess of Twenty Thousand Dollars ($20,000.00). The amount of security so heretofore filed is *in excess of any amount required to meet any exigency of their trust.* The continuance of such amount of security requires the payment of a premium to the bonding company that is acting as surety on such bond and creates an unnecessary hardship and expense to the said estate. [Emphasis added by court of appeals.]

The surety company consented to the granting of this petition (Pet. 32).

A notice of deficiency was served on Rose and Wittenberg in their official capacity on November 6, 1950, and on December 23, 1952, pursuant to stipulation of counsel, the Tax Court found that the estate owed an estate tax deficiency of $7,337.86 (Pet. 32).

Assessment was made by the Commissioner of Internal Revenue on February 12, 1953 (*ibid.*). On February 11, 1959, the United States filed suit against the estate to collect the balance due on the assessment, and obtained judgment by default. (Pet. 25, 32–33).

The present action was instituted by the United States on April 26, 1963, to establish, pursuant to Revised Statutes § 3467, the personal liability of Rose and Wittenberg for the estate taxes due and owing from the estate of Morris D. Rose, and to recover from petitioner pursuant to its obligation as surety on the administrators' bond. The district court, rejecting petitioner's defense of the statute of limitations, granted the government's motion for summary judgment (Pet. 24, 33). The court of appeals affirmed (Pet. 37), stating (Pet. 33–34):

> If, as has been argued, that period of limitation begins to run against the Government at the time of the original assessment against the estate, the instant suit would be barred. We find no need, however, to deal with the problems presented by this argument, for we think that under the particular circumstances of this case arising from the "petition to reduce bond," the "consent of the surety" and order of the Orphans' Court, the individual liability of the administrators to the Government is wholly independent of the liability established under R.S. § 3467.

The court of appeals held, alternatively, that Rose and Wittenberg were agents for the government, in that they had received funds on the representation

that they were holding them for another and thereby had undertaken the duty to account with respect to such property. The bringing of suit by the United States constituted ratification of the agency relationship (Pet. 36).

ARGUMENT

The decision of the court of appeals is not one of general application and its effect is not likely to be widespread. It was based upon and limited to the "particular circumstances of this case" (Pet. 33), arising from the petition to reduce the bond, which established the trust, the consent of the surety to the petition, and the order of the Orphans' Court granting it—circumstances which, as the court below held, gave rise to an express trust for the payment of federal estate taxes. Moreover, the decision is clearly correct and there is no conflict between circuits. Accordingly, further review is not warranted.

1. The judgment of a district court may, of course, be affirmed by a court of appeals where the decision of the district court was correct, although based upon an incorrect legal ground. *Helvering* v. *Gowran,* 302 U.S. 238, 245; *Riley Co.* v. *Commissioner,* 311 U.S. 55, 59. "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 88.

The administrators, in their petition to reduce the bond, stated that they were holding the funds remaining in their custody, in trust, to satisfy the estate tax claim of the United States, and for no other purpose (Pet. 34). Acting upon this declaration of trust, and the approval of the surety to their petition, the Orphans' Court permitted Rose and Wittenberg to obtain possession of the funds for this express and limited purpose. As the court of appeals correctly ruled, the result of the Orphans' Court proceeding was to create a trust for the benefit of the United States and vest the funds of the estate in Rose and Wittenberg as trustees for the United States (*ibid.*).

The court of appeals thus found it unnecessary to consider the defense offered by petitioner that the statute of limitations for Revised Statutes § 3467 had run. Correctly applying the law of Pennsylvania, the court of appeals held that the statute of limitations for trusts begins to run against a trust beneficiary with respect to a suit against the express trustee, if at all, only when the beneficiary knows that the trust has been repudiated or reasonably should have known it. *Pennsylvania Co. for Ins. et al.* v. *Ninth Bank & Trust Co.*, 306 Pa. 148, 158 Atl. 251. The court found no evidence here that the government could even have known of the trust arrangements for its benefit until some time after the unsuccessful return of execution on the 1959 judgment (Pet. 35).

Petitioner does not now seriously challenge the soundness of this ruling on the merits—or the soundness of the court of appeals' alternative ground of

affirmance (see Statement, p. 4, *supra*).[1] And it cannot claim surprise, since it had full opportunity to—and did—argue the court of appeals' grounds of decision in a petition for rehearing, which that court denied. Accordingly, the fact that the district court rested petitioner's liability on the bond on a different ground does not affect the validity of the court of appeals' decision.[2]

2. The jurisdiction of the federal courts in this case was soundly based on 26 U.S.C. 7402(a) and 7404 (see p. 2, *supra*), relating to the collection of federal estate taxes. This was in no sense a suit "to probate a will or administer an estate" (*Markham* v. *Allen*, 326 U.S. 490, 494); nor did the federal court "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court" (*ibid.*). The broad provisions of the applicable jurisdictional statutes plainly authorized the United States to enforce an express trust for the payment of federal estate taxes. And the assumption of jurisdiction in such a case imports no general intrusion into probate and trust matters.

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[1] No question of limitations could be raised with respect to the agency theory also adopted, as an alternative ground, by the court of appeals, since under that theory the duty of Rose and Wittenberg to account did not arise until this suit was brought on April 26, 1963.

[2] None of the cases cited by petitioner (Pet. 11) involved the question of the power of a court of appeals to affirm in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

U. S. GOVERNMENT PRINTING OFFICE: 1965